IN THE MATTER OF ARBITRATION BETWEEN

AINSWORTH ENGINEERED (USA), LLC Grand Rapids, Minnesota Employer/Company	DECISION AND AWARD
-and-	FMCS Case No. 06-53873 Grievance No. 1-06 Discharge-Susan Bishop, Grievant
UNITED STEEL WORKERS OF AMERICA And its Local 1095 Union	Award Dated: August 11, 2006

Date and Place of Hearing: June 27, 2006
Sawmill Inn
Grand Rapids, Minnesota

Date of Receipt of Post Hearing Briefs: August 4, 2006

APPEARANCES

For the Union: Gerard A. Parzino, International Representative
United Steel Workers of America
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Forest Lake, Minnesota 55025

For the Company: Douglas R. Christensen, Esq.
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ISSUE

Was the Grievant wrongfully terminated for refusing to return to work after being directed by her supervisor to do so. If so, what is the remedy.

WITNESSES TESTIFYING

Called by the Union	Called by the Employer
Sue Bishop, Grievant "B" Crew Trucker	Robert Lignell, Team Leader
Jim Rasley, President Local 1095	Jim Allen, Trucker
Randy F. Hemphill, Union Steward	Mike Carlson, Press Operator
Kevin Black, Site Manager	Kevin Black, Site Manager

ALSO PRESENT

For the Union	For the Employer
Michael Gunderson, Union Steward	Diane Feldt. Human Resources Technician
	Clayde Leonhan, MTC Manager

JURISDICTION

The issue in grievance was submitted to James L. Reynolds as sole arbitrator for a final and binding resolution under the terms set forth in Article XI of the Collective Bargaining Agreement between the parties (Joint Exhibit 1). The Arbitrator was mutually selected by the parties from a list of names of arbitrators submitted to them by the Federal Mediation and Conciliation Service of the United States Government. The parties stipulated at the hearing that the Arbitrator had been properly called, and that the grievance was properly before him for a decision.

At the hearing the parties were given full and complete opportunity to examine and cross-examine witnesses and present their proofs. Final argument was by post hearing briefs which were timely received. With the receipt of the post hearing briefs the record in this matter was closed. The issue is now ready for determination.

STATEMENT OF THE ISSUE

The issue in this case is whether or not the Grievant was wrongfully terminated for refusing to return to work after being directed by her supervisor to do so. If so, what is the remedy? The grievance was filed on February 1, 2006, and entered into the record of this hearing as Joint Exhibit 4. It reads in relevant part as follows:

> Describe issue: Employee was unjustly terminated.
>
> List any article in the Collective Agreement or Policy that was violated: 16.01 .
>
> What is the settlement the employee/union is asking for: Re-instatement and to be made whole.

The Company replied to the grievance at step 2 of the grievance procedure as follows:

> Step 2 Disposition Union discipline proposal not accepted. Management stands by original termination decision.

The sections of the Collective Bargaining Agreement that bear on the issue are found in ARTICLE XI – GRIEVANCE PROCEDURE, and ARTICLE XVI – COMPANY RULES, REGULATIONS AND DISCIPLINE. In relevant part they read as follows:

ARTICLE XI – GRIEVANCE PROCEDURE

* * * *

11.02

* * * *

C. The functions of the Arbitrator shall be to interpret and apply the Agreement and shall have no power to add to, subtract from, or to modify any of the terms of the Agreement.

* * * *

F. In a discharge case submitted to arbitration where the Arbitrator finds the discharge to be unjustified, the amount of payment for lost time shall be determined by the Arbitrator, but shall not exceed payment for the time lost as a result of the discharge at the employee's rate of pay at the time of discharge and shall be offset by any interim earnings, including unemployment compensation.

* * * *

H. The expense of the Arbitrator shall be borne by the party against whom the decision is rendered.

ARTICLE XVI – COMPANY RULES, REGULATIONS AND DISCIPLINE

16.01 Employees covered by this agreement shall observe such rules and regulations as may be established by the Company provided such rules and regulations do not conflict with any of the terms or provisions of this agreement. Violations of such rules will result in disciplinary action up to and including termination of employment. Any employee disputing the validity of such action may do so under the grievance procedure as outlined in this agreement, provided said dispute has been brought to the Company's attention in writing within five (5) working days of said discharge.

16.02 For the protection of both employees and the Company, the following actions simply cannot be tolerated and may result in immediate discharge:

* * * *

D. Refusing to carry out instructions as directed by a supervisor, except where safety of the employee may be involved.

* * * *

16.03 For violations of other general rules of conduct, the following disciplinary procedure may apply:

A. First offense – Verbal reprimand

B. Second offense – Written reprimand

C. Third offense – Suspension

D. Fourth offense – Termination

* * * *

FACTUAL BACKGROUND

Involved herein is a grievance that arose when the Company discharged the Grievant on February 1, 2006 for violation of Article 16.02 (D) of the Collective Bargaining Agreement [Refusing to carry out instructions as directed by a supervisor]. Specifically, the Grievant was discharged for refusing to return to her work duties when directed to do so by her Supervisor, Bob Lignell. The Company manufactures strand board at its plant in Grand Rapids, Minnesota. The Union is the exclusive bargaining representative of the production and maintenance employees at the plant.

For all relevant times, the Grievant was covered by the Collective Bargaining Agreement between the parties. The Agreement was made effective on October 15, 2002 and remained in full force and effect through October 14, 2004. It was extended by mutual agreement of the parties to cover the time of the incident that gave rise to this grievance. The Collective Bargaining Agreement initially ran between Potlatch Corporation and the Paper, Allied-Industrial, Chemical and Energy Workers International Union (PACE), Local 7-1095. Subsequently Potlatch was acquired by Ainsworth and PACE merged with the United Steel Workers of America. The labor contract entered as Joint Exhibit 1 survived through those events.

The Grievant was hired by Potlatch in February of 1998 as a part time employee. She was employed full time by Potlatch in August 1999. She became an employee of the Company when Potlatch was acquired by Ainsworth. She was discharged on February 1, 2006 for violation of Article 16.02 (D). At the time of her discharge the Grievant was classified as a Trucker on the "B" Crew Board Line, working the 6:00 AM to 6:00 PM shift. The Grievant's prior disciplinary record, if any, was not presented at the hearing by either side.

The incident that eventually led to the discharge of the Grievant occurred on January 29, 2006 at about 4:45 PM. During much of that day the line on which the Grievant worked had been down with operating problems. It is undisputed that both the operating employees and management were stressed over the difficulties of the line that day.

The Supervisor of the line, Bob Lignell was also concerned about the efficiency of the line, particularly the number and length of breaks some of the operating personnel were taking. Near the end of the shift on January 29th Mr. Lignell was looking for crew member Casey Shannon. He was told by Press Operator Mike Carlson that Mr. Shannon was seen heading for the lunch room. Mr. Lignell went to the lunch room, found Mr. Shannon there, and told him that he had taken five or six breaks that day and he needed to return to work. Mr. Shannon did so. Upon returning to his work station Mr. Shannon encountered the Grievant, Ms. Bishop. Mr. Shannon reported the lunch room incident to Ms. Bishop. In her testimony at the hearing Ms. Bishop testified that Mr. Shannon reported to her that Mr. Lignell had accused both Mr. Shannon and her of taking five or six breaks during the shift. Mr. Lignell, on the other hand, testified that he did not discuss Ms. Bishop's breaks with Mr. Shannon. Mr. Lignell's testimony on that point was corroborated by Mr. Jim Allen who was in the lunch room at the time of the discussion between Mr. Lignell and Mr. Shannon. Mr. Shannon did not appear at the hearing.

After the conversation with Mr. Shannon the Grievant sought out Mr. Lignell, and located him in the press control room. The ensuing discussion between the Grievant and Mr. Lignell was witnessed by Union member Mike Carlson who gave testimony under subpoena at the hearing. It is not disputed that the Grievant insisted on learning from Mr. Lignell how many breaks he thought she had taken that day. Mr. Lignell said to the Grievant that he would need to check his notebook. In attempting to do so the Grievant stood close to Mr. Lignell and attempted to look into his notebook. He told her to step

back, and get out of his notebook. The Grievant continued to demand to know how many breaks she was accused of taking. Mr. Lignell told her repeatedly to return to her work area and assist in getting the problems with the line resolved. He further advised her that given the current problems on the line that was not the time to discuss the matter. She persisted, however, on pursuing an answer to her question. Finally, Mr. Lignell advised her that she either report to her work area or pick up her lunch bucket and go home. That warning was repeated when the Grievant still did not comply.

Mr. Lignell then left the press control room and went to the supervisor's office. The Grievant followed him there, and leaned in the open window of the office still demanding an answer. Mr. Lignell told her that she should leave the plant. She did so.

On February 1, 2006 the Grievant returned to the plant for her next regular shift. She was then advised that she was being terminated "due to your insubordination toward your Supervisor and your general disregard for Ainsworth's General Rules of Conduct as shown by your behavior on shift Sunday, January 29, 2006". The termination notice (Joint Exhibit 3) went on to state that "This decision follows Article 16.02 D of The Paper Allied-Industrial, Chemical and Energy Workers International Union Local 1095 collective bargaining agreement."

It is not disputed that prior to her termination the Grievant was not asked to give a statement or otherwise provide her side of the story. The Union filed a timely grievance

which was processed through the required steps of the grievance procedure without resolution. It was heard in arbitration on June 27, 2006.

POSITION OF THE PARTIES

Position of the Company

It is the position of the Company that it had just cause to discharge the Grievant. In support of that position the Company offers the following arguments:

> 1. The Company conducted a fair investigation and grievance process that showed, considering the severity of the Grievant's offense, that the discipline imposed fit the offense and was not inconsistent with the collective bargaining agreement or any other limitations on its management rights.
>
> 2. The Company has the right to manage and discipline its work force, except to the extent expressly limited by the collective bargaining agreement. The labor contract in Article 16.02D explicitly and unambiguously states that refusing to carry out instructions as directed by a supervisor is a dischargeable act on the first occurrence. No particular disciplinary process such as progressive discipline is required for such a violation.
>
> 3. Employees clearly owe a duty to the Employer to follow reasonable instructions and not be insubordinate. One instance of insubordination is sufficient to warrant discharge under the terms of the collective bargaining agreement.
>
> 4. The Grievant was clearly insubordinate by refusing to return to her work area. Her conduct was made more egregious by the fact that it was done in the presence of another employee. The Grievant repeatedly and brazenly ignored the instructions of her Supervisor.
>
> 5. The Company's witnesses were credible and provided a clear, consistent and plausible description of the events. There is no basis to believe the Grievant's Supervisor fabricated the story. In order to sustain the grievance the Arbitrator would have to believe that all Company witnesses lied. An accused employee, on the other hand, has a strong incentive to deny the charges against her in order to try to save her job.
>
> 6. The Grievant's attempts at mitigation should not be given credence by the Arbitrator. The Union claims that the Grievant's actions and behavior

should be excused because Mr. Lignell would not answer a question about her breaks, and did not offer an optional time or place to "resolve" her break issue. The evidence shows, however, that he did answer her question after consulting his notebook, and did offer to discuss the matter further after the shift ended.

7. The Union argues that the Grievant's conduct should be excused because Mr. Sorby allegedly told her to address issues right away with a supervisor or manager. It is not disputed, however, that no manager, including Mr. Sorby told the Grievant to disobey a supervisor's order in the pursuit of a timely settlement of an issue.

8. It is not disputed that the Grievant repeatedly ignored the clear order of her Supervisor to return to work. While she quibbled with the exact number of times she ignored and disobeyed Mr. Lignell's instructions, she acknowledged that she did so multiple times.

9. The tenure of the Grievant does not entitle her to leniency. A long term employee has no right to expect to be held to a lesser standard.

10. The prior disciplinary record of the Grievant was not presented at the hearing. Accordingly, there is no basis for the Arbitrator to make an informed determination of the weight to be assigned to her previous discipline. In all probability, the Union's awareness of the Grievant's "very black record of violations and disciplines" including a recently expired last chance agreement, likely convinced it not to pursue that argument. Accordingly, the Grievant should not be given any leniency on account of her work record.

11. In order to sustain the grievance, the record must show that the Company discriminated against the Grievant, was unfair, or was capricious or arbitrary in its action. The record contains no such showing of an abuse of its contractually provided discretion. Additionally, there was no showing that the Grievant was singled out for disparate treatment.

12. The discharge of the Grievant was warranted by her serious and brazen actions and behavior, and should be sustained.

Position of the Union

The Union argues that the Company wrongfully terminated the Grievant, and that she should be returned to work with full seniority and economic compensation to her position

as a "B" Crew Board Line Trucker. In support of its position, the Union offers the following arguments:

1. The Company wrongfully terminated the Grievant. She was only trying to clarify a very disturbing comment by Casey Shannon to the effect that Mr. Lignell believed that she had taken five or six breaks on the day in question.

2. The Grievant's Supervisor, Bob Lignell, refused to answer her legitimate question about the number of breaks she was believed to have taken. If he had said at the time what he said later, that he was not troubled with the breaks taken by the Grievant this entire incident would never have happened. By refusing to answer, Supervisor Lignell caused the incident to escalate.

3. The line was having operating problems that day, and both operating employees and management were stressed by the situation. The Union believes that the stress of the situation caused Mr. Lignell and the Grievant to respond in a manner they would not have had the circumstances been more relaxed.

4. The Grievant believed that she was following the direction of Mr. Sorby to resolve issues right away. She had legitimate concerns that Mr. Lignell had been misinformed about the number of breaks she had taken, and felt that could adversely affect her employment record at the Company.

5. Supervisor Lignell did not answer the Grievant's question. He only told her to go back to work. The Grievant asked again because her question had not been answered.

6. The Company first indicated that the Grievant would be disciplined but not terminated. That changed, and she was discharged upon her return to work on February 1st.

7. The Company never obtained the Grievant's side of the story before she was discharged. Site Manager Kevin Blau testified that he made the decision to discharge the Grievant, and that he did so without talking to or gathering information from her.

8. The discipline of discharge in this case is too severe. The record clearly shows that management was also at fault. Mr. Lignell refused to answer a legitimate question of the Grievant, and that refusal resulted in the escalation of the incident.

9. Arbitrable authority found in Elkouri and Elkouri, How Arbitration Works, 6th Ed. provides that when management is also at fault the penalty should be set aside or reduced by the Arbitrator.

10. The Grievant's Supervisor never agreed to meet later to discuss her concerns, and he never stated at the time that he had no problem with the number of breaks she took. He only told the Grievant to go back to her work area. Had an offer to meet later been made, or had Mr. Lignell stated that he had no problem with her breaks, the incident would not have occurred.

11. The Grievant has eight years with the Company and has expressed remorse over the incident. It was a frustrating day for both management and the operating employees. The Grievant acknowledges that mistakes were made by both sides.

ANALYSIS OF THE EVIDENCE

The controlling language in this grievance is found in Article XVI of the Collective Bargaining Agreement. At Section 16.01 the parties agreed that employees covered by the contract shall observe rules and regulations established by the Company that do not conflict the Agreement. At Section 16.02 the parties agreed that violation of certain rules may result in immediate discharge. The parties further provided at Section 16.02D that refusing to carry out instructions as directed by a supervisor is such a rule. The intent of the parties is absolutely clear in this language. They clearly intend that employees must carry out reasonable instructions from a supervisor or risk immediate discharge. This language does not mandate, however, immediate discharge in any case where an employee does not carry out a supervisor's instruction. The phrase "***may*** result in immediate discharge" found at the end of the first paragraph in Section 16.02 clearly shows that the parties intend that in some cases sufficient mitigating factors may be

present to not compel immediate discharge. Permitting consideration of such mitigating factors is basic to a just application of this contract language.

The Collective Bargaining Agreement in this case does not expressly specify the application of a "just cause" standard in disciplinary cases. Neither party argued that such a standard was not applicable in this case. To the contrary, both sides recognized the burden on the Employer to show that it had just cause to discharge the Grievant. In cases where a "just cause" standard for discipline is not found in the labor contract, such a standard is nonetheless often applied by arbitrators. See How Arbitration Works, by Elkouri and Elkouri, 6th Ed., 2003, BNA, p. 930 as follows:

> "Many arbitrators would imply a just cause limitation in any collective bargaining agreement. For instance, one arbitrator held that "a just cause" limitation on discharge is 'implied' in any labor agreement. The reasoning is that "[i]f management can terminate at any time for any reason, such as one finds in the 'employment at will' situation, then the seniority provision and all other 'work protection' clauses of the labor agreement are meaningless." "[T]he prevailing view is that to alter this implied requirement of just cause, the parties must in fact so specify in their written agreement."

Accordingly, based on the fact that the parties recognized the application of the "just cause" standard in this case and the prevailing view of arbitrators to imply such a standard, such a standard is applied here.

The contract does not define "just cause". Accordingly, the usual and ordinary meaning of that term is applied. A commonly recognized definition of just cause is found in Just Cause, the Seven Tests, by Koven and Smith, 2nd Ed., 1992, BNA. These seven tests are attributed to the distinguished arbitrator Carroll R. Daugherty, and described in Enterprise

Wire Co. (46LA 363, 1966). They are 1) reasonable rules and orders, 2) notice, 3) investigation, 4) fairness of the investigation, 5) proof, 6) equal treatment, and 7) fairness of the penalty. These tests provide a useful structure for analysis of the facts and circumstances of this case.

Reasonableness of Rules and Notice

Employers clearly have a right to require employees to carry out reasonable orders issued by supervision that do not conflict with the labor contract. The Union does not argue that point here. The Company may establish and enforce reasonable rules of conduct, including a requirement that employees carry out instructions as directed by a supervisor. The parties clearly agree with the establishment of such a rule, because they have included that rule in Article 16.02 D of the Collective Bargaining Agreement.

By including this rule directly in the Collective Bargaining Agreement there can be no doubt that notice of the rule has been provided. The Company, the Union and all covered employees are reasonably expected to know the provisions of the contract. The Union did not claim in this case that the Grievant was unaware of the rule requiring her to carry out instructions of her Supervisor. Accordingly, the reasonableness and notice tests of just cause are met.

Investigation and Fairness of Investigation

Just cause requires that prior to imposing discipline the Employer conduct a thorough and fair investigation. The record in this case shows that the incident was elevated to higher

levels of management for review before the decision to discharge was reached. The Grievant's discharge did not occur until after those deliberations. It is very troubling, however, to find in the record that the Grievant was not asked to give her side of the story in the course of the investigation. She reported on her next scheduled day of work and was informed that she was being terminated. The Company made no attempt to learn if there were any circumstances present from the Grievant's perspective that would mitigate the incident. Obtaining a grievant's side of the story during an investigation is not merely a courtesy. It is fundamental to conducting an objective investigation and providing a grievant with due process. The evidence in this case was carefully examined to determine if, by denying the Grievant an opportunity to give her side of the story before being discharged, her due process rights were materially trampled. That examination compels a finding that they were not. The issue involved (i.e. violation of Article 16.02 D) is relatively straightforward. Either the Grievant followed the instruction of her Supervisor to return to work or she did not. A finding of whether she did or did not was easily be made by the Company by talking with the Supervisor involved and the bargaining unit employees who witnessed the incident. Such a finding would not require a statement from the Grievant. A timely grievance procedure was invoked by the Union wherein the Grievant's side of the story was eventually heard. Additionally, the Grievant had opportunity to tell her side of the story at the arbitration hearing, and did so. Accordingly, while it is troubling that the Company did not take her statement, the evidence compels a finding that her due process rights were ultimately not compromised.

Proof

In this discipline case the Company is burdened to show that it had just cause to impose the sanction of discharge. Meeting that burden requires that the Company show with a preponderance of the evidence that the Grievant actually committed the acts of which she stands accused. The Grievant is accused of not returning to her work area when directed to do so by her Supervisor. It is not disputed that Mr. Lignell directed her to return to her work area, and that she did not do so. The record shows that after being repeatedly told to return to her work area the Grievant refused to do so every time. While there was some variance in the testimony as to how many times she had been told to go back to work, the record compels a finding that there were multiple such orders given by her Supervisor. The record also shows that all of those orders were refused. Only when her Supervisor declared an end to the conversation, and repeated that she should get her lunch bucket and leave the plant did she finally leave his presence. She left the plant and did not return to work that day.

The Grievant stands accused of insubordination by refusing to go back to her work area when directed to do so by her Supervisor. She claims that she never obtained an answer to her question to Mr. Lignell regarding how many breaks she had taken that day. The record, however, shows that Mr. Lignell showed her his notebook that recorded four breaks for her on January 29, 2006. Accordingly, the record shows that she did receive an answer to her question. The Grievant also claims that her Supervisor never set a time when they could further discuss the issue of her breaks. That claim fails by the record showing that Mr. Lignell told her that they could discuss the matter at the end of the shift,

but that he could not take the time then because he was caught up in addressing the problems on the line. Clearly, the Grievant received an answer to when they could meet to discuss the matter more completely.

More importantly, the issue in this case relates to whether or not the Grievant refused to carry out a reasonable order of her Supervisor. It is not fundamentally about whether or not her question was answered. If the Grievant felt she was being set up for unjustified discipline due to her Supervisor's opinion regarding the breaks she took, that could have been discussed and perhaps grieved later.

Careful examination of the testimony in this case shows that the Grievant's questions for Mr. Lignell were not calm, reasoned inquiries. To the contrary, they were confrontational challenges argumentative in nature. The record shows that her Supervisor gave her multiple opportunities to return to work and avoid the problems she eventually faced. She chose to ignore those opportunities and pressed the issue to an unfortunate end.

The evidence compels a finding that she refused to carry out a reasonable instruction from her Supervisor. That is a clear violation of Article 16.02 D of the labor contract.

Equal Treatment

The record does not show that the Grievant was singled out for disparate treatment, and the Union made no claim that she was.

Fairness

The facts and circumstances in this case compel a finding that the sanction of discharge was made with just cause. Infraction of reasonable rules, as here, is a serious breech of the employer/employee relationship. An employee is hired to perform the tasks reasonably assigned, in exchange for the compensation and other benefits set out in the labor contract. Refusing to comply with a reasonable supervisory directive is an affront to the legitimate business interests of the Company and the essence of the collective bargaining relationship.

Importantly, the parties have agreed in their labor contract that failure to carry out instructions as directed by a supervisor is a violation of the contract that could result in immediate termination. An arbitrator may wish to apply some other sanction than what was imposed by management. The Arbitrator cannot, however, impose his sense of an appropriate sanction unless the record shows the Company abused their discretion. Such abuse would be found only when there is convincing evidence that the Company was capricious or arbitrary in its action. Should such evidence have been found in this case this Arbitrator would not hesitate to set the discipline aside. Convincing evidence of managerial abuse of discretion is lacking here, however. Accordingly, the Arbitrator lacks authority to set the discipline imposed by the Company aside. To set the discipline aside absent such clear evidence of the Company abusing its managerial authority would clearly exceed the authority the parties have given the Arbitrator through the Collective Bargaining Agreement. That is especially true when, as here, the labor contract specifies

that refusal to carry out a supervisory directive is a dischargeable violation on the first offense.

AWARD

The evidence compels a finding that the Grievant was not wrongfully terminated. The Company did not exceed its authority in discharging the Grievant. Accordingly, the Arbitrator is without power to set its actions aside. The grievance and all remedies requested are denied.

Dated: August 11, 2006 /s/ James L. Reynolds,

James L. Reynolds
Arbitrator

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